S174507

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ESTUARDO ARDON, on behalf of himself and all others similarly situated,
Plaintiff/Appellant

vs.

CITY OF LOS ANGELES
Defendant/Respondent

After a Decision By The Court of Appeal
Second Appellate District, Division Three
Case No. B201035

Appeal from the Superior Court for the County of Los Angeles
Hon. Anthony J. Mohr, Judge
Trial Court Case No. BC 363959

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Appellant asks this Court to provide taxpayers a new remedy – an expensive, inefficient and potentially devastating one – where the Legislature has not expressly provided it, our Constitution proscribes it and ample, less costly and more efficient remedies already exist. There is no valid, existing precedent for the class claims for local tax refunds Appellant asks this Court to establish. There are however, ample reasons not to allow such claims unless expressly authorized by the Legislature.

First, in *Woosley v. State of California* (1992) 3 Cal.4th 758 ("*Woosley*"), this Court declined to liberally allow class claims for tax refunds by extending the relaxed construction of claiming statutes afforded to nuisance and other commercial tort claims to tax refund claims. This Court expressly, resoundingly and unanimously rejected that request to extend the "substantial compliance" rule to tax refund cases, reaffirming the importance of Section 32 of Article XIII of the California Constitution (providing for strict legislative control of tax refund claims) and the firmly established and fundamental public policies underlying it, and concluding that tax refund claims must be ***expressly authorized*** by statute and ***strictly comply*** with applicable claiming requirements. For over a decade since, a long line of decisions of the Courts of Appeal followed the *Woosley* decision and are in accord with each other. The decision below in this case is one of that line. The sole outlier and inconsistent case, *County of Los Angeles v. Superior Court (Oronoz),* 159 Cal.App.4th 353 (2008)

("*Oronoz*"), was only in place for a few months and was subsequently overruled by the Second District, restoring consistency to the case law.

Second, Section 32 of Article XIII of the California Constitution ("Section 32") compels this result. That Section requires strict legislative control over tax refund claims, mandating that an action to recover taxes paid may only be brought "in such manner as may be provided by the Legislature." The language of Section 32 is unequivocal, applies broadly to all tax refund claims and, **on its face,** refutes Appellant's attempts to limit it to a narrow subset of tax refund claims. The plain language of Article 32 and its legislative history make clear that strict legislative control of tax refund claims applies equally to local governments, and not just to the State.

Finally, ample public policy supports the protection of the revenue streams that fund essential public services and the need to constrain the expensive and cumbersome class remedy to those instances in which the Legislature has expressly authorized it. As the Appellate Court below explained:

> *Woosley* follows a line of Supreme Court cases that broadly construed Article XIII, Section 32 in light of the paramount policy underlying that provision. These cases emphasized that Article XIII, Section 32 serves the important purpose of prohibiting an unplanned disruption of revenue collection, "'so that essential public services dependent on the funds are not unnecessarily interrupted.'"

> This policy is especially important where, as here, a plaintiff seeks to assert a class action on behalf of very large numbers of people, and the governmental entity faces an unexpected and huge liability. It is vital that the Legislature retain control over the manner in which claims may be asserted, so that governmental entities have sufficient notice of claims to allow for predictable and reliable fiscal planning."

Ardon v. City of Los Angeles (2009) 174 Cal.App.4th 360, 381.

In other words, the Appellate Court below correctly applied this Court's existing precedent, plain Constitutional language and compelling public policy to reach the same result as did not only this Court but numerous prior Courts of Appeal. By contrast, Appellant largely ignores *Woosley* and treats only superficially the authorities relied upon by the trial court and the appellate court. Viewed under the clear and focused lens of the rule established by precedent for tax refund claims – namely, that express legislative authorization and strict compliance are required – Appellant's class claim must fail. The Legislature has not expressly authorized class claims for local tax refunds and, instead, has mandated that claimants provide individualized information about their claims and themselves. As the Constitution demands, the rules relaxing these requirements for torts and other non-tax claims cannot apply where governments' ability to provide essential governmental services is at stake. Moreover, that exception need not apply given that ample alternative remedies exist to ensure state and local taxes comply with law.

For these reasons, the City respectfully requests that the decision of the two lower courts be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Although the Appellate Court did not address the merits of the underlying claims and this Court's grant of review presents no questions as to the merits of those claims, Petitioner's opening brief attempts to distort the equities by including a one-sided and incomplete "background" on the underlying claims. The City responds briefly here to provide more complete context for this Court's decision of the procedural issue now before it.

A. The City's Telephone Users Tax and Appellant's Claim

The underlying dispute in the instant case involves the effect of the changing interpretation of the federal excise tax (FET) on telephony on local agencies' interpretation of their own taxes. In particular, Appellant objects to the manner in which the City has calculated its telephone users tax (TUT) and claims that changes in the interpretation of FET over time required a reduction in the TUT tax base. As noted by Appellant, the City has consistently applied its TUT to long distance charges from the inception of the tax. (Appellant's Opening Brief ("Opening Brief") at 7, citing Clerk's Transcript ("CT") 12; App. A.) Indeed, until July 2006, the Federal government construed the FET in the same manner. The federal

government's interpretation of the FET to include long distance charges was longstanding: a 1979 IRS ruling expressly held that the FET applied to long distance services that were billed solely on the basis of elapsed time (and not on the basis of both elapsed time and the distance between the telephones served), and that ruling remained undisturbed for nearly 30 years despite transformative changes in the telecommunications industry. (*See* Revenue Ruling 79-404, 1979-2 C.B. 382. Exhibit D to City's Request for Judicial Notice ("Request for Judicial Notice") filed on April 28, 2008.) Appellant however contends that, when the Internal Revenue Service (IRS) changed its position with respect to the FET in July 2006 via Notice 2006-50 (Exhibit E to Request for Judicial Notice), the City was required to change its interpretation of its local TUT ordinance as well.

Appellant's argument ignores both the historical application and adoption of the City's local TUT and the IRS's subsequent rulings. The express language of the TUT referred to Section 4251 of Title 26 of the United States Code – i.e., the FET – "**as such Section existed on November 1, 1967**" and not as the IRS subsequently re-interpreted that Section in 2006. Nothing in the TUT indicated a desire to change the interpretation of the local tax to reflect changes in federal law nor any delegation of authority to the federal government to interpret the TUT. Moreover, the IRS clarified this point by its Notice 2007-11, issued on January 29, 2007 (*See* Exhibit F to Request for Judicial Notice at § 10), which states:

> Neither Notice 2006-50 nor this notice affect the ability of state or local governments to impose or collect telecommunication taxes under the respective statutes of those governments.

Accordingly, following IRS Notice 2006-50 announcing a change in federal enforcement of the FET, the City adopted a clarifying amendment to the TUT to confirm that the City's interpretation had not changed over time and the historical practice of applying it to long-distance calls measured by the length of the call alone – just as the FET had been applied from 1967 to 2006 – would continue. (CT 49-52.) Furthermore, Appellant's background also fails to note that even if long-distance charges are excludable from the TUT base (a point the city vigorously contests), their own failure to segregate taxable from non-taxable charges – i.e., local from long-distance charges – renders the actual impact of that exclusion at best difficult to calculate and potentially inconsequential.[1] In short, a dispute arose as to the base of the City's local telephone tax given the IRS' decision to reduce the base of the federal tax.

Due to this dispute, Appellant sent a demand letter to the City on October 19, 2006 in which he requested a tax refund on behalf of himself

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[1] *Dell v. Superior Court* (2008) 159 Cal.App.4th 911, 925, 932 (where taxable and non-taxable transactions are "bundled," they may all be taxable depending upon the purpose; where they are "mixed" the charges must be segregated; the process is "difficult" and the burden of proof "is on the taxpayer".) The rationale for this rule is plain – the telephone businesses charged with collecting the tax may not be permitted to evade it by the manner in which they keep their books. If they want the benefit of exclusions from the tax base, they must maintain accounting records sufficient to demonstrate their entitlement to that benefit.

and purportedly on behalf of all similarly situated taxpayers. (Clerk's Transcript ("CT") 42-45.) The City rejected Appellant's claim. (CT 18 at ¶ 67; 47.)

At its February 5, 2008 election, the City's tax was presented to the voters. Although the voters had the opportunity to reject the tax, they did not do so. Instead, the electorate approved Measure S, thereby modernizing the TUT to reflect the transformative changes in telecommunications technology and marketing since 1967. The tax, renamed a Communications Users Tax to emphasize its application to non-voice communications technologies as well as telephony, continues to tax telephone communications services – including both local and long-distance charges – without regard to the distance between the telephones connected by a call. (*See* Exhibits A and B to Request for Judicial Notice.) The City Council certified passage of Measure S on March 4, 2008. (Exhibit A to Request for Judicial Notice.) The new CUT ordinance does not refer to the FET. (Exhibit B to Request for Judicial Notice.) The adoption of the CUT ordinance thus mooted all of Appellant's claims for prospective relief and confirmed the voters' desire to continue to tax their consumption of both local and long-distance services to fund critical public services.[2]

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[2] Appellant argues that the City's failure to grant the refund it demands stands "in stark contrast" to the federal government's decision to refund FET. (Opening Brief at 9.) In reality, the "stark contrast" is that in this case, the voters of the City of Los Angeles confirmed overwhelmingly that the City had been acting exactly as the voters wished them to and that the voters preferred the City to continue to tax long-distance telephone charges. (Exhibit A to Request for Judicial Notice.) Ours is a federal democracy.

B. Trial Court Proceedings

Appellant proceeded to court, filing a class action lawsuit asserting six causes of action: Count 1, a claim for declaratory and injunctive relief to prevent collection of the TUT; Count II, a claim for declaratory relief regarding the amendment of the TUT to eliminate the reference ot the FET; Count III, a claim for money had and received; Count IV, a claim for unjust enrichment; Count V, a claim for violation of due process; and Count VI petitioning for writ relief. (CT 7; 13-17.) The complaint contained no allegation that the individual members of the asserted class had filed administrative claims or even that they were aware of or had consented to the filing of a claim, nor did it estimate the number of claimants involved or the amount of taxes in issue. Rather, the complaint relied upon the claim filed by Appellant acting on his own, purportedly on behalf of all other similarly situated taxpayers. (CT 18 at ¶ 64; CT 42-45.)

The City filed a Demurrer and Motion to Strike with respect to each of these causes of action on May 2, 2007. The matter was heard by the Honorable Anthony J. Mohr of the Los Angeles County Superior Court on July 6, 2007. (CT 71; 142-143.) The court struck the class allegations and the claims for injunctive relief without leave to amend. The court overruled

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As a result, there is no overarching principle of law that requires consistency between the federal telephone tax and the similar – but not identical – tax imposed by Los Angeles. That the federal government taxes this service more modestly than Los Angeles does not require Los Angeles to do so or obligate it to refund taxes properly due under its own ordinances.

the demurrer with respect to Appellant's individual claims for money had and received and unjust enrichment. (CT 142)[3]

C. Court of Appeal Proceedings

Appellant filed a notice of appeal on July 23, 2007, arguing that the preliminary ruling was appealable as a "death knell" for his claims. (CT 144.) On May 28, 2009, the Court of Appeal, Second Appellate District, Division Three, affirmed the trial court's order striking Appellant's class allegations. Prior to the grant of review by this Court, the Court of Appeal's opinion was published at *Ardon v. City of Los Angeles* (2009) 174 Cal.App.4th 360 ("*Opinion*".) The Court of Appeal's decision expressly overruled *County of Los Angeles v. Superior Court* (2008) 159 Cal.App.4th 353, 357 ("*Oronoz*") a recent decision of this same Division of the Second District Court of Appeal which had permitted class claims for tax refunds against a local entity under Government Code § 910.

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY FOLLOWED THE RULE THAT CLASS CLAIMS FOR TAX REFUNDS MUST BE

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[3] The court also found that there was no need for declaratory relief because there was an applicable statutory mechanism provided under Los Angeles Municipal Code § 21.1.12 governing administrative claims. (CT 142.) The court reserved its ruling on the claim for declaratory relief, however, staying that aspect of the order. (CT 142.) The court also stayed its ruling on the writ claim. (Reporter's Transcript ("RT") A-26.)

EXPRESSLY AUTHORIZED BY STATUTE AND STRICTLY COMPLY WITH APPLICABLE CLAIMING REQUIREMENTS

This Court unambiguously held in *Woosley v. State of California* that class claims for tax refunds require express legislative authorization and strict compliance with authorizing claims statutes because "strict legislative control over the manner in which tax refunds may be sought is necessary so that governmental entities may engage in fiscal planning based on expected tax revenues." *Woosley*, 3 Cal.4th at 789. Given the devastating impact of this Court's decision on his ambition to create a new avenue for class action litigation, Appellant attempts to narrow, limit, dismiss and distort this Court's unanimous decision in *Woosley*. However, as set forth more fully below, *Woosley* and its reasoning remain sound; Article XIII, Section 32 which underlies the decision requires strict control over tax refund claims in any event; and public policy compels the same result. Appellant points to no change in Article XIII, Section 32 which would justify departure from *Woosley*'s precedent or any other authority to do so. Accordingly, Appellant's ambitions ought not to be realized here.

As a result, the Appellate Court below was entirely proper in recognizing that:

> "[W]here, as here, a plaintiff seeks to assert a class action on behalf of a very large number of people, and the governmental entity faces an unexpected and huge liability . . . "[i]t is vital that the Legislature retain control over the manner in which claims may be asserted, so that governmental entities have sufficient notice of claims to allow for predictable and reliable fiscal planning."

Opinion, 174 Cal.App.4th at p. 381. In other words, the Appellate Court correctly followed this Court's decision in *Woosley*, the dictates of Section 32 and the fundamental public policies underlying them.

A. This Court Has Already Decided That Tax Refund Actions Must Be Expressly Authorized and Strictly Comply With Claiming Requirements

Appellant contends "*Woosley* does not say that strict compliance with claims statutes is required in tax refund cases." (Opening Brief at 20.) This contention misconstrues both this Court's reasoning and its holding in *Woosley*.

Woosley held that both express legislative authorization and strict compliance with claiming requirements are required in tax refund cases. First, writing for a unanimous Court, the Chief Justice explained that claims for tax refunds "must be brought in the manner prescribed by the Legislature" (*Id.* at 789) and that courts are precluded from "expanding the methods for seeking tax refunds **expressly provided** by the Legislature" (*Id.* at 792 *emphasis added.*) *Woosley* reinforces the requirement that legislative authorization be express by explaining that silence does not constitute the requisite authorization. *Woosley*, 3 Cal.4th at 792 (that "the Legislature has been silent on the subject of class claims seeking refunds of use taxes … did not constitute legislative authorization of such class claims".) In other words, *Woosley* plainly and explicitly held that tax refund claims require express legislative authorization of the type Appellant has not identified – and cannot identify – to sustain his claims.

Second, although *Woosley* did not use the phrase "strict compliance," the Court just as plainly held that strict compliance is required when it rejected the substantial compliance test of *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447 ("*City of San Jose*".) That case decided by this Court in 1974 by a 4-3 margin over a trenchant dissent by Justice Tobriner, applied a substantial compliance test to an administrative class claim of nuisance and inverse condemnation by the operation of a commercial airport – a proprietary activity of government having nothing to do with the collection of a tax to fund essential public services. *City of San Jose*, 12 Cal.3d at 457.[4] In *Woosley,* this Court specifically considered the very argument here that *City of San Jose* should be extended to tax claims and concluded that the holding "should not be extended to include claims for tax refunds." *Woosley*, 3 Cal.4th at 799.

Thus, while this Court did not use the phrase "strict compliance," *Woosley's* unequivocal rejection of the substantial compliance rule for tax refunds and its requirement of express legislative authorization, can only be viewed as imposing a "strict compliance" rule and the Courts of Appeal

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[4] That *City of San Jose* involved proprietary activity is crucial to the policy issues underlying Article XIII, section 32. It is one thing to visit large and unexpected liabilities on a quasi-commercial activity as to which external social costs such as noise nuisances can and should be incorporated into the price the government sets in leasing airport rights to for-profit airlines. It is quite another to apply the expensive, inefficient and potentially devastating remedy of a class action to disputes regarding taxes imposed to fund essential government services. Thus, this Court need not revisit *City of San Jose* (though it may wish to do so) to sustain the result reached below in this case and in the long line of cases, including *Woosley*, which declined to extend that decision into territory from which it is barred by the mandate of Article XIII, section 32.

have repeatedly so concluded. *See Neecke v. City of Mill Valley*, 39 Cal.App.4th 946, 961 (1995) ("a taxpayer must show strict, rather than substantial, compliance"); *Mission Housing Development v. City and County of San Francisco*, 59 Cal.App.4th 55, 70 (1997) ("requiring strict compliance"); *Farrar v. Franchise Tax Board*, 15 Cal.App.4th 10, 19-21 (1993) ("administrative tax refund procedures . . . are to be strictly enforced"); *State ex rel. Dept. of Motor Vehicles v. Superior Court*, 66 Cal.App.4th 421, 432 (1998) ("Strict compliance is required".)

In other words, this Court concluded that Article XIII, Section 32 strictly limits tax refund claims and prohibits class actions in tax refund cases, except in those rare instances in which the Legislature expressly authorizes class relief in a tax refund case and a claimant strictly complies with applicable claiming requirements.

B. Article XIII, Section 32 of the California Constitution Requires That Tax Refund Claims Be Expressly Authorized and Strictly Comply With Applicable Claiming Requirements

Woosley reflects the requirements of Article XIII, Section 32 of the California Constitution. Thus, *Woosley* explained:

> "The California Constitution expressly provides that actions for tax refunds must be brought in the manner prescribed by the Legislature. It provides in this regard: 'After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with

interest, **in such manner as may be provided by the Legislature**.'" (Emphasis added.)

Id. at 792 (citing Cal. Const., Art. XIII, § 32.) *Woosley* thus enforced the California Constitution's assignment to the Legislature of exclusive control over tax refund claim procedures.

As explained by the Court of Appeal below, in this regard, *Woosley* followed a long line of Supreme Court cases that:

> "[B]roadly construed Article XIII, Section 32 in light of the paramount policy underlying that provision . . . and the important purpose of prohibiting an unplanned disruption of revenue collection, 'so that essential public services dependent on the funds are not unnecessarily interrupted.'"

Opinion, 174 Cal.App.4th at 381*(citations and internal quotations omitted.)*

Thus, the requirements of express legislative authorization for tax refund claims and strict compliance with claiming procedures is not a judicial invention, a construction of a particular statute or a reaction to the facts or equities of a particular case; it derives directly and plainly from the Constitution. It is more than the authoritative common law of our State – it is the demand of the popular sovereign that framed our Constitution.

C. The Requirements of Express Authorization and Strict Compliance Apply Equally To Local Tax Refund Claims As to Claims Against the State

Appellant contends that Article XIII, Section 32 applies only to tax refund actions against the State, and not to such actions against local governments. (Opening Brief at 23.) This contention fails because it overlooks the separate meanings attributed to each of the two sentences of Article XIII, Section 32. In particular, the express grant of authority to the Legislature to control tax refund procedures is contained in the second sentence of Article XIII, Section 32 which, unlike the first sentence, contains no limitation to the State or its taxes, but addresses tax refund procedures in general.

Article XIII, Section 32 of the California Constitution provides:

> No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

(Cal. Const., art XIII, § 32.) The two sentences of Article XIII, Section 32, when "[r]ead together ... establish that the sole legal avenue for resolving tax disputes is a postpayment refund action. A taxpayer may not go into court and obtain adjudication of the validity of a tax which is due but not yet paid. *State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638.

However, each sentence of Article XIII, Section 32 also has independent meaning. The first sentence – "No legal or equitable process shall issue in any proceeding in any court against this State or any officer

thereof to prevent or enjoin the collection of any tax" – prohibits judicial interference with tax collection. This first sentence expressly identifies the "State and its officers" as the taxing authorities whose tax collection efforts may not be judicially restrained.[5]

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[5] Interestingly, although courts have acknowledged that the language of the first sentence of Section 32 specifies "the State," some nevertheless have found that public policy requires that the anti-injunction provision in the first sentence of Section 32 be applied to all taxes in California, whether state or local. *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1138 (no injunctive or declaratory relief against local parking tax); *Writers Guild of America, West, Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th 475, 481 (no injunctive or declaratory relief against local business tax); *accord Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444 1457 fn. 22; *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 72-73 (equitable relief barred re local transient occupancy tax); *Rickley v. County of Los Angeles* (2004) 114 Cal.App.4th 1002, 1013-1014 (equitable relief barred re local property tax); *Flying Dutchman,* 93 Cal.App.4th at p. 1137; *Writers Guild,* 77 Cal.App.4th 475 at p. 479 (same.) The rationale expressed for precluding injunctive or declaratory relief in these tax cases is the strong public policy favoring the uninterrupted funding of governmental activities, and disfavoring interference with the government's ability to fund essential public services. "This principle is generally known as the 'pay first, litigate later' rule, and it applies at all levels of government – **the federal** (26 U.S.C. §§ 7421, subd. (a), 7422, subd. (a); 28 U.S.C. §§ 1346, subd. (a)(1), 2201, subd. (a); *Flora v. United States* (1958) 357 U.S. 63, 67-75; *Cheatham et al. v. United States* (1875) 92 U.S. 85, 88-89); **the state** (Cal. Const., art. XIII, § 32; Rev. & Tax. Code, §§ 6931 [sales and use taxes], 19381, 19382 [franchise and income taxes]; *State Bd. of Equalization v. Superior Court* (1985) 39 Cal.3d 633, 638); **and the local** (Rev. & Tax. Code, §§ 4807, 5140 [property taxes]; S.F. Bus. & Tax Regs. Code, § 6.15-4, subd. (a) [persons challenging tax "must first pay the amount of the disputed tax ... prior to seeking judicial relief"]; *Flying Dutchman, supra*, at p. 1136-1138; *Writers Guild of America, West, Inc. v. City of Los Angeles* (2000) 77 Cal.App.4th

The second sentence of Section 32 – the one at issue here – establishes strict legislative control over tax refund actions and is not similarly limited to the State and its officers. In contrast to the first sentence, it makes no reference to the State. Nor does it contain any limitation whatsoever on the types of tax refunds subject to legislative authority; reflecting a broad policy regarding all tax claims, it is stated in broad and unqualified terms.

It is this second sentence that was relied upon by this Court in *Woosley* (3 Cal.4th 758, 789) and by the Court of Appeal below (*Opinion*, 174 Cal.App.4th at 382.)

Appellant's failure to appreciate the distinct meanings of the two sentences of Article XIII, Section 32 becomes apparent upon examination of the cases cited to support his contention that "Article XIII, Section 32 is inapplicable to actions against local public entities." (Opening Brief at 23-24.) Careful review of the decisions that have discussed the application of Section 32 to local taxes reveals that they provide no support for a limited reading of its second sentence. Those few cases that have limited application of Article XIII, Section 32 to the State, including those cited by Appellant, have done so as to requests for injunctive relief and therefore focus on the first sentence's anti-injunction provision. On the other hand, those cases that **have** addressed the second sentence of Article XIII, Section 32 have found it to apply to all state or local taxes.

475, 483.) *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 71-72, citations and footnotes omitted, other bracketed text in original.

1. Cases That Indicate Article XIII, Section 32 Only Applies To The State Did Not Consider That Section's Language Mandating Legislative Control of Tax Refunds

Although the City has frequently pointed out that *Eisley v. Mohan* (1948) 31 Cal.2d 637 ("*Eisley*") was decided under a differently worded predecessor to Section 32, Appellant persists in his erroneous reliance on the case for the proposition that Section 32 applies only to an action against the State or a State officer. (Opening Brief at 24.)[6] However, a correct reading of *Eisley* actually undermines Appellant's argument by demonstrating the differences in drafting between Section 32 and its predecessor. That predecessor provision – former Section 15 of Article XIII – was a single sentence as follows:

> No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of **any tax levied under the provisions of this Article**; but after payment **thereof** action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected.

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[6] Moreover, Appellant also relies upon *Eisley* indirectly by continuing to cite the since-repudiated appellate court decision in *Oronoz*, which mistakenly cited *Eisley* as a Section 32 case. (*See, e.g.,* Opening Brief at 10, 19, 25.)

Former Cal. Const. art. XIII, § 15, as of 1948 (emphasis added) as quoted in *Eisley*, 31 Cal.2d at 640.

This former Section 15 is thus grammatically and substantively different from the present Article XIII, Section 32. Section 15 comprised a single sentence, rather than two with different subjects. In addition, former Section 15 limited all of its provisions to "any tax levied under the provisions of this Article" (*i.e.*, taxes imposed under Article XIII of the Constitution) by including that limiting phrase directly in its anti-injunction provision – and referring back to that limitation by use of the word "thereof" in the provision requiring refund procedures to be as authorized "by law." No such limitation exists in the second sentence of the present Article, XIII, Section 32, which simply protects *all* tax revenues and contains no restriction at all regarding the type of tax or taxing authority within its sweep. Finally, former Section 15 did not contain Article XIII, Section 32's clear assignment to the Legislature of exclusive authority over tax refund procedures. Former Section 15 authorized a refund action "as may be provided by law" contrasted with Article XIII, Section 32's grant of authority to "the Legislature."

Thus, judicial interpretations of the former Section 15 are of limited, if any, value in interpreting the meaning of Article XIII, Section 32's express delegation of authority to the Legislature with respect to all taxes. Further, *Eisley* has no bearing on *Woosley* or its expansive interpretation of Article XIII, Section 32 as it exists today. Rather, the history and development of Section 32 reflected in *Eisley* and subsequent developments establish that the constitutional protection of tax revenues from refund

claims not governed by statutorily required procedures was substantially broadened over time. The rule's earlier limitations to specified taxes were eliminated and the link between the first and second sentences was intentionally severed. That history strongly supports the application of the second sentence of Section 32 to local taxes, a conclusion numerous other authorities readily have also reached..

Appellant likewise cites *Pacific Gas & Electric Co. v. State Bd. Equalization* (1980) 27 Cal.3d 277 ("*Pacific Gas & Electric*") for the proposition that "Section 32 applies only to actions against the state." (Opening Brief at 24.) *Pacific Gas & Electric* sought a writ against the State Board of Equalization to compel a reduction in a property tax assessment. In other words, *Pacific Gas & Electric* was decided under the first sentence of Article XIII, Section 32, the anti-injunction provision. Not surprisingly, Article XIII, Section 32's anti-injunction provision applied to the State Board of Equalization as a state agency and the writ was denied. The language from *Pacific Gas & Electric* cited by Appellant does not address the second sentence of Article XIII, Section 32 and is in fact *dicta* found in a footnote regarding the first sentence. *Id.* at 281, fn. 6; *see also County of Los Angeles v. Southern California Edison Co.* (2003) 112 Cal.App.4th 1108, 1117 (*Pacific Gas & Electric's* statement regarding applicability of Section 32 to local authorities is dicta.) Moreover, the *dicta* were solely for the purpose of distinguishing a prior decision – *Star-Kist Foods, Inc. v. Quinn* (1960) 54 Cal.2d 507 ("*Star-Kist*") – that denied mandate relief without discussing Section 32. *Pacific Gas & Electric*, 27 Cal.3d at 281 fn. 6 (*Star-Kist* distinguished because it involved a county tax and did not discuss Section 32.) Indeed, *Pacific Gas & Electric* did not

analyze the applicability of either sentence of Section 32 to local governments and instead relied solely on *Eisley* for its *dicta* purportedly limiting Section 32. *Pacific Gas & Electric*, 27 Cal.3d at 281 fn. 6. *Pacific Gas & Electric* is thus of even less value than the *Eisley* decision it cites to aid us in determining the meaning of Section 32.

Finally, Appellant cites *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809 ("*La Habra*"), for the proposition that Section 32 does not apply to local governments. (Opening Brief at 24.) *La Habra* addressed the statute of limitations applicable to an action for declaratory relief regarding an allegedly invalid utility tax. *La Habra*, 25 Cal.4th at 812, 821. In a footnote this Court stated Article XIII, Section 32's bar on "injunctive and writ relief in tax actions against the State of California and its officers" was inapplicable to local government officers. *Id.* at 822 fn. 5. Again, nowhere was the second sentence of Section 32 – pertaining to the exclusive authority conferred on the Legislature to establish tax refund procedures – discussed, analyzed or limited.[7]

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[7] On Reply, Appellant will undoubtedly also cite the Second District's recent decision in *Anaheim v. Superior Court* ___ Cal.Rptr.3d ___, 2009 WL 4044762 (Nov. 24, 2009) (No. B216250) and its finding that Section 32 has been limited to actions against the state or an officer of the state. *Id.* at 3. Again, though, the decision in *Anaheim* focused solely on the first sentence of Article XIII, Section 32. Having never discussed or considered the second sentence of Article XIII, Section 32, *Anaheim* is of little value in determining the Legislature's authority over state and local tax refunds or the scope and reach of the second sentence of Section 32. Moreover, that case was previously the subject of a grant of review by this Court, is not yet final, and the City anticipates a further petition for review to this Court will be filed shortly.

In sum, the cases cited by Appellant as limiting Section 32 to actions against the State are of limited, if any, value in determining whether the second sentence of Section 32 applies to local tax claims.

2. Cases That Examine The Second Sentence Of Article XIII, Section 32 Indicate That The Requirements of Express Authorization and Strict Compliance Do Apply to Local Tax Refund Claims

More importantly, those cases that *have* addressed the second sentence of Section 32 uniformly conclude that it applies to all taxes, state or local. For example, in *Todd Shipyards Corp. v. City of Los Angeles* (1982) 130 Cal.App.3d 222 ("*Todd Shipyards*"), the Court of Appeal held that interest was due on the refund of a Los Angeles business tax, stating:

> That the public policy of this state contemplates the payment of interest on wrongfully collected taxes is manifest by Article XIII, Section 32 of the California Constitution, which states in pertinent part: After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature.

Todd Shipyards, 130 Cal.App.3d at 227, internal quotations omitted. In interpreting the second sentence of Article XIII, Section 32, the court did not distinguish between state and local taxes. Instead, the court applied the second sentence of Article XIII, Section 32 to a local tax refund.

Similarly, *Macy's Dept. Stores, Inc. v. City and County of San Francisco* (2006) 143 Cal.App.4th 1444, concluded that Section 32 applies to local taxes. There, the Court of Appeal considered whether the interest due on a refund of a local business tax was governed by state statute or the interest provision of a local ordinance. In applying the state statutory interest rate, the court relied on the second sentence of Section 32 and characterized the payment of interest on the local tax refund as a "requirement[] of state **constitutional** and statutory law." *Id.* at p. 1458 & fn. 24 (Emphasis added.) Thus, the court explicitly applied to a local tax the constitutional requirement of Section 32 that interest be paid in the "manner ... provided by the Legislature."

Moreover, numerous Court of Appeal decisions have applied to local tax refunds the strict compliance rule *Woosley* derived from the second sentence of Section 32. Indeed, for more than a decade, California appellate authority has consistently recognized that the *Woosley* rule and its reasoning apply to local taxes with the one aberration corrected by the very Justices who issued it, without intervention by this Court.

In *Neecke v. City of Mill Valley* (1996) 39 Cal.App.4th 946, 962, the First District rejected the claim that the *Woosley* rule is inapplicable to tax refund actions against municipalities, observing:

> "the argument ... is belied by the *Woosley* decision itself. Nothing in the language of *Woosley* indicates an intent to limit that case's holding to claims statutes addressed to state, as opposed to local, taxes; indeed, that part of the court's opinion dealing with the class claim issue twice uses the term 'government entities.'"

The Court of Appeal below, agreed with *Neecke* and interpreted the term "government entities" as "broad and plural" and not "limited to the state alone." *Opinion*, 174 Cal.App.4th at 384.

In reaching this conclusion, both courts emphasized that *Woosley* disapproved *Schoderbek v. Carlson* (1980) 113 Cal.App.3d 1029. *Neecke*, 39 Cal.App.4th at 962-963; *Opinion*, 174 Cal.App.4th at 385. *Schoderbek*, relying upon *City of San Jose*, permitted class claims and class actions for refunds of local property taxes. *Woosley* discussed *Schoderbek* extensively and expressly disapproved it. *Woosley* 3 Cal.4th at 788, 792. As noted by the *Neecke* court:

> "[t]here was simply no reason for the Supreme Court to disapprove of *Schoderbek* unless the court intended its *Woosley* holding to apply to local, as well as state, taxes."

Neecke, 39 Cal.App.4th at 962-963. The appellate court here agreed. *Opinion*, 174 Cal.App.4th at 384.

Again in *Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 77 (depublication request denied, Jan. 3, 2008, Cal. S. Ct. Case No. S158168), the Court of Appeal reiterated the broad reach of the *Woosley* strict compliance rule to all tax refund claims, regardless of the taxing entity. That case involved a purported class action claim for a local tax refund brought under a municipal claiming ordinance. The plaintiff in *Batt* argued that *Woosley* was not controlling and should be "narrowly applied." *Id.*, at p. 76. Rejecting the plaintiff's contention that all of the

cases expressly disapproved in *Woosley* involved state taxes, the *Batt* court stated, "We could not disagree more, as we made clear – or at least believed we made clear – 12 years ago in *Neecke*." *Id.* Moreover, the court in *Batt* stated:

> "It may be true, as plaintiff asserts, that *Woosley* does not 'categorically' forbid class actions in tax refund cases. But it did in effect preclude refund class actions except where the antecedent administrative claim on behalf of the putative class is expressly authorized by statute."

Id., at p. 77. *Batt* thus expressly found Section 32 equally applicable to local governments as to the State and rejected the purported class claim for a local tax refund. *Id.*, at p. 84.

Similarly, *Howard Jarvis Taxpayers Association v. City of Los Angeles* (2000) 79 Cal.App.4th 242, 250 applied *Woosley's rule* to a purported class action for the refund of a local business license tax, noting that under *Woosley*, "class-action-type lawsuits seeking a refund of fees and taxes are barred unless each plaintiff has first filed an administrative refund claim with the City." Similarly, in *Kuykendall v. State Board of Equalization* (1994) 22 Cal.App.4th 1194, a consumer class action seeking the refund of a San Diego sales tax previously held unconstitutional by this Court, the Fourth District held that Section 32 precludes a court from expanding the methods for seeking tax refunds expressly provided by the Legislature, and found that statutory tax refund procedures are to be strictly

enforced. *Kuykendall*, 22 Cal.App.4th at 1202-1203. In so doing, the *Kuykendall* court applied the second sentence of Section 32 to a local tax.

Yet again, in *IBM Personal Pension Plan v. City and County of San Francisco,* the Court of Appeal followed *Woosley* in a local tax matter. The court there focused on the second sentence of Section 32 and its assignment to the Legislature of "plenary control" over tax refund procedures:

> "Because Article XIII, Section 32 vests the Legislature with plenary control over the manner in which tax refunds may be obtained, a party 'must show strict, rather than substantial, compliance with the administrative procedures established by the Legislature.'"

(2005) 131 Cal.App.4th 1291, 1299, quoting *Neecke*, 39 Cal.App.4th at 961, citations omitted. Further still, in *Cod Gas & Oil Co. v. State Bd. of Equalization* (1997) 59 Cal.App.4th 756, 759-60, the Court of Appeal applied *Woosley* to require strict compliance with claiming requirements for refunds of county sales taxes. *See also Rider v. County of San Diego* (1992) 11 Cal.App.4th 1410, 1419-1421 (same, relying on *Woosley*); *Thomas v. City of East Palo Alto* (1997) 53 Cal.App.4th 1084, 1095 (applying *Woosley*, but reaching opposite result where each plaintiff had submitted an administrative claim.)

Most recently, in *Chase Bank N.A. v. City and County of San Francisco*, a property tax refund case, the First District reiterated that:

> Because Article XIII, Section 32 ... vests the Legislature with plenary control over the manner in which tax refunds may be obtained, a party must show strict compliance with the administrative procedures established by the Legislature."

(2009) 174 Cal.App.4th 1201, 1211 (internal quotations omitted.)

As illustrated by the authorities cited above, the **overwhelming** weight of California appellate authority recognizes the application of the rules of strict compliance and express authorization derived from the **second sentence** of Section 32 to local taxes.

The sole outlying appellate decision that held, inconsistently with the long line of cases discussed above, that the rule in *Woosley* requiring strict compliance for tax refund claims does not apply to local taxes – *County of Los Angeles v. Superior Court* (2008) 159 Cal.App.4th 353 ("*Oronoz*") – has been overruled in this case by the very court that rendered the decision just months previously. As Appellant admits, the Opinion of the Appellate Court below overruled *Oronoz's* holding that a claim under Government Code Section 910 for a refund of local taxes could be asserted on behalf of a class. (Opening Brief at 6, 10.) Sixteen months after the decision in *Oronoz,* a substantially similar panel[8] of Division Three of the

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[8] In *Oronoz*, 159 Cal.App.4th 353 the panel of the Court of Appeal, Second Appellate District, Division Three consisted of Croskey, J., with Klein, P.J. and Aldrich, J., concurring. In *Ardon*, the panel of the Court of Appeal, Second Appellate District, Division Three, consisted of Kitching, J., with Klein, P.J., concurring and Croskey, J., dissenting. A panel in the same district of the Court of Appeal may overrule another panel's decision. *Imperial Irrigation District v. State Water Resources Control Board,*

Second Appellate District unequivocally found that *Oronoz* was incorrectly decided. *Opinion*, 174 Cal.App.4th at 383. The Appellate Court here exceeded mere disagreement with the prior decision in *Oronoz*, but specifically stated that it "overrule[d]" *Oronoz* to the extent it conflicted with the finding that "a [Government Code] Section 910 claim for a tax refund on behalf of a class is precisely the type of claim prohibited by the plain language of *Woosley*" and the policy underlying Article XIII, Section 32. *Id.* at 384.[9]

Thus, all of the remaining cases that have examined the strict Legislative control over tax refund actions set forth in the second sentence of Section 32 have uniformly concluded that its restrictions apply to local taxes. The sole outlier was promptly found to be error by the very Justices who issue it.

(1990) 225 Cal. App. 3d 548, 556 (in ruling on a matter it previously remanded to the trial court the Court of Appeal noted that "of course [it] has the power to reconsider its prior decisions."); *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1598 217 Cal. App. 3d 1591 (decision of another panel of the same court may be overturned for compelling reasons); *Opsal v. U.S. Automobile Assoc.* (1991) 2 Cal. App. 4th 1197, 1203-1204 (following *Bolden*, permissible to overrule decision of another panel of same court.)

[9] Appellant notes that this court has granted review in *Loeffler v. Target Corp.* There, too, the Second District Court of Appeal rejected *Oronoz* in a unanimous decision reiterating that Section 32 and the policies underlying it must be broadly construed. (2009) 173 Cal.App.4th 1229; Opening Brief at 6. The *Loeffler* court sustained a demurrer to a class action for refund of sales tax "on the ground, among others, that Article XIII, Section 32 of the California Constitution bars plaintiffs' action." *Loeffler* (2009) 173 Cal.App.4th 1229, 1234.

D. Public Policy Likewise Compels Express Authorization and Strict Compliance With Claiming Procedures For The Refund Of Local Taxes

Appellant erroneously contends that the Court of Appeal below misconstrued the policy of Section 32. (Opening Brief at 26.) In fact, that court correctly identified several fundamental policies underlying Section 32 and its requirements that tax refund procedures be expressly authorized by the Legislature and complied with strictly.

For example, the Court of Appeal quoted this Court's statement in *Woosley* that Section 32:

> "[R]ests on the premise that strict legislative control over the manner in which tax refunds may be sought is necessary so that government entities may engage in fiscal planning based on expected tax revenues.

Opinion 174 Cal.App.4th at 380; *Woosley*, 3 Cal.4th at 789. Incredibly, Appellant challenges the Court's **direct quote** from *Woosley* as based "upon an incomplete citation," arguing that the policy only applies "during litigation" or "until the taxpayer pays the tax." (Opening Brief at 26-27) yet providing no language from this Court's decision in *Woosley* to support the claim.

Of course, this limitation appears nowhere in this Court's discussion in *Woosley* and is yet another illustration of Appellant's persistent refusal to account for the separate subjects addressed in the two sentences of Section 32. Appellant correctly observes that *State Board of Equalization v.*

Superior Court (1985) 39 Cal.3d 636 (*State Board of Equalication*), referred to the policy of continued revenue collection during litigation. However, that case considered whether a taxpayer could file suit before full payment of the disputed tax, directly implicating the anti-injunction provision (sentence one) of Section 32. Because *State Board of Equalization* involved a suit challenging the collection of a tax prior to payment, the policy focus was, of course, on continued "revenue collection...during litigation," "the prompt payment of taxes," and "prompt collections of a tax." *Woosley,* on the other hand, forcefully established that the predictability of public revenue streams and the need for fiscal planning apply to both provisions of Section 32 and compel the strict legislative control required by its second sentence.

Given that the tax at issue in the underlying matter has already been collected, the majority in the Court of Appeal below correctly focused on the policy of legislative control "over the manner in which claims may be asserted, so that governmental entities have sufficient notice of claims to allow for predictable and reliable fiscal planning." *Opinion*, 174 Cal.App.4th at 381. It is Appellant who misconstrues the applicable policy behind Section 32, not the court below.

Moreover, Appellant fails to address the other compelling policies identified by the court below. The appellate court further explained that preserving the strict compliance and legislative control requirements for tax refund cases also serves to prohibit "unplanned disruption of revenue collection" and to ensure that "essential public services dependent on the funds are not unnecessarily interrupted." *Id.* at 381. Indeed, the Court was

very specific in its application of these policies to the very type of case asserted here:

> "This policy is especially important where, as here, a plaintiff seeks to assert a class action on behalf of very large numbers of people, and the governmental entity faces an unexpected and huge liability. It is vital that the Legislature retain control over the manner in which claims may be asserted, so that governmental entities have sufficient notice of claims to allow for predictable and reliable fiscal planning."

Id.[10]

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[10] Appellant also complains that the Court of Appeal erred in discussing the policy factors underlying Section 32 instead of Section 32 itself. Of course, the court did discuss Section 32 and concluded that it applied to local tax refund claims. However, even if it Section 32 did not directly apply, it would still have been proper for the court to consider the policy underlying Section 32 and whether it barred the class action claim. Notwithstanding the limited codification of the class action remedy in Code of Civil Procedure Section 382, it continues to be essentially equitable in nature. *Farrar v. Franchise Tax Board* (1993)15 Cal.App.4th 10, 17. However, equity will not lend its aid in violation of law **or policy underlying such law**. *Lass v. Eliassen* (1928) 94 Cal.App.175, 179. Therefore, the court was within its discretion to refuse to allow a class action to proceed in violation of the fundamental public policies underlying Section 32.

1. Limiting Class Actions In The Context Of Tax Refunds Promotes Predictable And Reliable Financial Planning And Does Not Disturb The Most Cost Effective Remedies Available To Taxpayers

All governments, whether state or local, must balance their budgets based on projected revenues and expenditures and plan for anticipated liabilities. Despite Appellant's protestations that the interest in fiscal planning only applies prior to payment, it is indisputable that class claims would introduce significant uncertainty into government fiscal planning. While there may be some cases where the defendant city can determine the extent of a class claim just from the representative's information, but that is certainly not the case in general, nor is it the case here (*see, e.g.,* footnote 1 *supra.*) Because a potential class contains an unknown number of claimants who may be claiming tax refunds of different amounts, the extent of liability may take months or years to determine. In fact, it may be impossible for a government entity presented with such a class claim to quantify the magnitude of the claim, given that the records are often in the hands of the tax collectors (*e.g.*, the carriers with respect to TUT.)

This scenario runs directly counter to the policy calling for stability and predictability in government finance. While Appellant may prefer lower phone bills, he – like all residents, property owners and visitors in the City – is entitled to a response should he ever use his phone to dial 911. Thus, in the area of tax refunds, requiring each prospective class member to strictly comply with Government Code Section 910 (as discussed below) by submitting his or her own tax refund claim prior to filing suit will assist government entities predict and plan for potential liabilities.

It is, of course, both obvious and central to the framing of Section 32 that local revenues, such as the utility users tax questioned here, are critical to the provision of police, fire, roads, parks and other basic local services. In fact, the TUT at issue here represents a $270 million annual revenue stream for the City of Los Angeles. (Exhibit B to Request for Judicial Notice.) Municipal taxes support vital public services throughout the State of California, and the argument that municipal tax revenue in general, and TUT revenue in particular, are not sufficiently important to merit the protection of Section 32 is unfounded and illogical, at best. To argue that the powerful, expensive and (for class counsel) rewarding remedy of a class action should be assumed to have been authorized by the Legislature for local taxes, but that strict legislative control is needed to protect state revenue, does not do justice to the language, history and purpose of this provision of our Constitution or this Court's interpretation of it. Nor does it respect the reality that police and firefighters do not provide services without paychecks any more than prison guards and university professors do.

2. The Policies Favoring Class Remedies in Other Contexts Do Not Apply to Tax Refund Claims

Ironically, Appellant argues that reference to the policies underlying Section 32's restrictions on tax refund claims is improper (Opening Brief at 24-25), yet repeatedly urges policy arguments reflecting the "importance of the class action mechanism" and the "need to deter wrongdoing" that should somehow override *Woosley* and the the plain dictate of Section 32.

However, even of their own terms, these policies are not compelling in the context of tax refund claims.

For example, Appellant's arguments that plaintiffs would be left without remedies are not persuasive here. There are a plethora of more efficient and effective remedies than class action lawsuits (where a substantial portion of the resources and recovery is invested in the lawyers and cumbersome process and every penny must ultimately be derived from taxpayers.) For example, taxpayers can and do file individual refund claims; indeed, the very cases cited by Appellant in his long string of federal citations as support for his argument that the FET does not apply to long distance charges were brought by individual taxpayers.[11]

Similarly, private tax collectors, in this case telecommunications carriers, can file – and have already filed[12] – suit, seeking to recover TUT paid on behalf of their customers, the taxpayers. (*See* Los Angeles Municipal Code Section 21.1.12, Exhibit G to Request for Judicial Notice.) Moreover, because taxes are in dispute here, as opposed to commercial or other private conduct, voters have the option of initiative repeal or amendment of the tax. In fact, the signature requirement for repeal or reduction of a tax by initiative is substantially reduced under Article XIII C,

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[11] Even the IRS was allowed to exercise its discretion in determining how and when to issue refunds so as to ensure that there was no significant disruption in revenue. With respect to the FET, the courts found the tax inapplicable to long distance charges and then left the IRS to fashion a remedy.

[12] Appellant cites one of these cases, *Nextel Boost of California dba Boost Mobile v. City of Los Angeles*, in its opening brief at footnote 1, but erroneously characterizes the claim as an individual refund claim by a corporate taxpayer.

Section 3 of the Constitution, a provision of 1996's Proposition 218.[13] Voters can also elect sympathetic elected officials, recall unsympathetic ones and petition their government for redress of grievances. In these respects, taxes are fundamentally different from other commercial behavior where these other remedies are not available and the expense and burden of class claims are not borne by the taxpayers. The class action remedy may be needed to deter commercial conduct involving individual small sums that are cumulatively large due to the absence of other effective remedies, but such is plainly not the case in the context of public revenues.

Indeed, some of the important purposes and policies underlying class remedies do not even apply to claims for tax refunds. One of the hallmarks of the class remedy is the distribution of the unclaimed or unpaid residue of a class fund **for the public benefit**. *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 389 (conc. opn. of Tobriner, J.) (residue to be distributed "the state government for some public use benefitting class members along with other state governments"); *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 726 (distribution of residue to public schools); *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 136 ("substantial benefit to the public" as class action requirement); *see also* Code Civ.

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[13] Article XIII C, Section 3 preserves the power of initiative for "repealing or reducing any local tax" and provides that the signature requirement shall not be "higher than that applicable to statewide statutory initiatives." Article II, Section 8(b) and Elections Code Section 9035 define that signature requirement as 5% of the number of votes cast in the last gubernatorial election. As gubernatorial turnouts in cities like Los Angeles are commonly in the neighborhood of 40%, this means that just 2% of the registered voters of the City may compel election on reduction or repeal of a tax (.05 x .40 = .02.)

Proc., § 384(a) (Legislature's intent "to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians.".) Yet, this Court has previously recognized that sometimes the public benefit is better served by leaving the residue in the public fisc to be used for the public good. *Blue Chip*, 18 Cal.3d at 385-387 (refusing to certify a class to recover small amounts of sales tax because "any excess reimbursement benefited a larger class, the citizenry of California which includes the purported class. Balancing fairness, should not any overcharge remain in the public treasury?") The Court further explained that "the individual's interests are no longer served by group action, the principal – if not the sole – beneficiary then becomes the class action attorney." *Id.*

Similarly, the policies underlying a class remedy for quasi-commercial government activity (what older case law referred to as "proprietary" activity) such as the commercial airport operation in *City of San Jose* simply are not present in a tax refund case. There, the City was engaged in commercial activity and the plaintiff sued in tort. There are compelling reasons for different treatment of government's commercial activity, as compared to its collection of taxes to fund essential public services. To begin with, essential services are, well, **essential**. When a government engages in commercial activity, on the other hand, it commonly does so in competition with private, for-profit competitors who face class remedies for their alleged wrong-doing. To subject government to class remedies thus levels the playing field in our market-based economy. In addition, when government engages in commercial activity, it

is generally free to set its prices at any price the market will bear, to re-price its goods and services quickly, and to suffer the consequences if its prices are not competitive and to use those prices to pass on to the ultimate commercial beneficiaries of its activity the full social cost of the enterprise. By contrast, our Constitution requires voter approval for the taxes which fund essential government services.[14] Moreover, general taxes may only be placed before the voters every two years absent an emergency unanimously declared by a local legislative body.[15] Thus, absent an emergency, government acting as a tax collector generally needs two years' notice (due to the requirement of Article XIII C, Section 2(b) that general taxes be placed on general election ballots) of a loss of tax revenues to plan for essential services, such as police and fire protection. Government acting as a market participant does not generally need such notice.

Finally, Appellant's repeated assertions about the City's "abuse of power" and the need to deter wrongful conduct are likewise misplaced. As noted above, one of the many remedies available to the citizens of Los Angeles was to put the tax to a vote – and their legislators did just that. The

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[14] Article XIII C, § 2(b) (general taxes imposed by local governments require majority voter approval at general election in which legislative seats are contested); § 2(c) (special taxes imposed by local governments require two-thirds voter approval.)

[15] California Constitution, Article XIII C, § 2(b) ("The election required by this subdivision shall be consolidated with a regularly scheduled general election for members of the governing body of the local government, except in cases of emergency declared by a unanimous vote of the governing body.") Los Angeles Charter § 401 (general municipal elections are held on the third Tuesday in March during odd-numbered years), Exhibit C to Request for Judicial Notice.

voters confirmed that they wanted to continue paying the tax to fund public services for their benefit. Thus, even assuming *arguendo* that Appellant's underlying claims were correct, at best Appellant would have established that the City continued to do exactly what its constituents wanted it to do – to collect TUT revenue and to provide essential public services. In other words, the voters took care of this "problem" and a class action would only serve to contravene the direct wishes of the electorate – a far better representative of the class asserted here than Appellant and his counsel.

Simply put, although Appellant fails to see the unique character and features of governmental revenue generation and insists on treating it as a commercial enterprise, the Constitution has no vision problem. The Constitution recognizes in numerous provisions the unique function and critical role of government in raising revenues and providing services. Section 32 is one such provision and embodies the fundamental policy that the Legislature is uniquely qualified to balance the critical need for stability and continuity of government services, the many alternative remedies and alternatives available to the voters and the need to divert resources from the public treasury to compensate class counsel. Accordingly, it is the Legislature that our Constitution empowers to strictly control the manner in which claims can be presented.

II. GOVERNMENT CODE SECTION 910 DOES NOT EXPRESSLY AUTHORIZE APPELLANT'S CLASS CLAIM

Appellant's contention that his class claim is authorized under Government Code Section 910, ignores Section 32's requirements that he

strictly comply with claiming requirements and that his claim be expressly authorized by the Legislature, as well as the terms of Section 910 itself.

A. Government Code Section 910 Does Not Expressly Authorize Class Claims and Instead Requires Individualized Information

As discussed above, *Woosley* and Section 32 require express legislative authorization of class claims. Government Code section 910 makes no mention of class claims and contains no language expressly authorizing class claims. Under *Woosley* and Section 32 that silence is dispositive and courts are prohibited from finding the statute impliedly authorizes class claims. *Woosley*, 3 Cal.4th at 792 (that "the Legislature has been silent on the subject of class claims seeking refunds of use taxes ... did not constitute legislative authorization of such class claims".) The inquiry should end there.

However, taking it a step further, even cursory inspection of Government Code Section 910 demonstrates it requires individual information about claimants, including their names and post office addresses and the date, place and circumstances of each claim. Section 910 provides in its entirety as follows:

> "A claim shall be presented by the claimant or by a person acting on his or her behalf and shall show all of the following:
> (a) The name and post office address of the claimant.
> (b) The post office address to which the person presenting the claim desires notices to be sent.

(c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.
(d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.
(e) The name or names of the public employee or employees causing the injury, damage, or loss, if known.
(f) The amount claimed if it totals less than ten thousand dollars ($10,000) as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. If the amount claimed exceeds ten thousand dollars ($10,000), no dollar amount shall be included in the claim. However, it shall indicate whether the claim would be a limited civil case."
(Govt. Code, § 910.)

Section 910 thus requires that a claim be presented "by the claimant or by a person acting on his or her behalf" along with specific information about the claimant.

Appellant first argues that under *City of San Jose,* the "claimant" can simply be equated with the class itself and therefore no information is required for any claimant other than a class representative. However, the simple use of the word "claimant" cannot be viewed as express authorization of class claims, nor can provision of a single name address

and claim description be viewed as strict compliance. This is precisely the contention that was resoundingly rejected by this Court in *Woosley*. Were it otherwise, every claiming requirement would authorize class claims; for how would one impose a claiming requirement without reference to the concept of a claimant?

Appellant next argues that the language can be distinguished from the language of the Vehicle Code statute at issue in *Woosley*. (Opening Brief at 19.) Specifically, Appellant argues that although the Vehicle Code Section 42231 language "his agent on his behalf" does **not** constitute express authorization of class claims, Section 910's nearly identical language of "a person acting on his behalf" should be viewed as express authorization. This argument fails for numerous reasons. Opening Brief at 19; *Woosley*, 3 Cal.4th at 789-790.

First, the language of Section 910 is, for all practical purposes, identical to that of the Vehicle Code claiming statute at issue in *Woosley*. For example, Civil Code Section 2296 defines "agent" as "one who represents another." Thus, Appellant is arguing for a distinction that would fundamentally de-stabilize local government finance on the basis that "a person who represents another on his behalf" should be viewed as materially different from "a person acting on his behalf." Surely the Legislature would use far less subtle language to describe a distinction of the magnitude of that for which Appellant argues.

Second, Appellant again ignores that in *Woosley* this Court expressly, deliberatively, and unanimously declined to extend *City of San Jose,* a case which itself applied Section 910, in the manner Appellant now urges. In fact, the Chief Justice's opinion in *Woosley* specifically quotes

Section 910, emphasizing the very language that Appellant now wishes to distinguish:

> "A claim shall be presented **by the claimant or by a person acting on his or her behalf** and shall show all of the following: [¶] (a) The name and post office address of the claimant ...."

(Woosley, 3 Cal.4th at 789.) Immediately following the quote, *Woosley* **declines to extend** the holding of *City of San Jose* to tax refund disputes. Had this Court viewed the language of Vehicle Code Section 42231 as meaningfully different from the quoted language of Section 910, there would have been no need to "decline to extend" *City of San Jose*. The Court could simply have stated that the terms of the Vehicle Code were meaningfully different than Section 910 and distinguished the two statutes. Instead, this Court decided *Woosley* on a constitutional ground fully aware of its own prudential preference to decide cases on statutory, rather than Constitutional, grounds when it is possible to do so.[16] Of course, that is not what this Court held. This Court declined to extend *City of San Jose* precisely because the language of the two statutes was functionally equivalent and it was the reasoning of *City of San Jose* that could not be applied to tax refund cases such as *Woosley* because of the mandate of Section 32. The fact that the Court felt the need to decline to extend *City of*

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[16] *Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.* (2008) 44 Cal.4th 528, 538, citing *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105 (explaining Court's "common practice of construing statutes, when reasonable, to avoid difficult constitutional questions".)

San Jose reveals that the Court believed that the *Woosley* analysis would yield a different result when applied to the language of Section 910 than the *City of San Jose* analysis. Stated more plainly: there was no need to base the decision on Section 32 and to decline to extent *City of San Jose* if the decision could have rested on a meaningful distinction between Section 910 and the Vehicle Code Section in issue in *Woosley*. That this Court saw that need argues persuasively that this is no meaningful distinction between the two statutes, as Appellant urges.

Third, even if this court were to conclude that – contrary to its unanimous decision in *Woosley* – the phrase "by a person acting on his or her behalf" could somehow be read to expressly authorize a claim made on behalf of a group of claimants without their knowledge or consent, such a claim would still require the name and post office address of each claimant, pursuant to Government Code Section 910, subdivision (a.) In other words, Appellant cannot escape that the only type of claim that has been **expressly** authorized by the Legislature under Section 910 still requires individual information about each claimant.

Finally, *Woosley* analyzed not only Vehicle Code Section 42231 (which Appellant quotes), but also Revenue & Taxation Code Sections 6901, et seq., which Appellant does not mention. *Woosley*, 3 Cal.4th at 790. The Revenue & Taxation Code Sections at issue in *Woosley* had no agency language and no express provisions at all authorizing class claims or stating who may file such claims. *Id.* at 791-792. Consequently, this Court explains in *Woosley* that silence cannot provide the legislative authorization Section 32 requires and, therefore, where class claims in tax refund cases are not **expressly** authorized, they are barred. *Id.* at 792.

Similarly, the failure of Section 910 to preclude the possibility of a class claim does not provide the required express legislative authorization; authorization of class claims for tax refunds cannot be implied or inferred from what is **not** required by the statute.

Thus, it would require several inferences and something far less than strict compliance with the requirements of Government Code Section 910 to find there the express legislative authorization for class claims for tax refunds.

Likewise, Appellant's argument that "nothing in *Woosley* ... suggests that this Court overruled *City of San Jose* or that Section 910 can have two different meanings depending on whether the claim filed is for return of illegally collected taxes or something else" (Opening Brief at 18-19) misses the mark. The issue is not whether the language of Section 910 is to be given two different meanings, depending upon the type of claim. Instead, the issue is whether the standards of strict compliance (required in the context of a tax refund claim) and substantial compliance (allowed in the context of non-tax claims, such as the noisy commercial airport operations in issue in *City of San Jose*) can yield different results. If they could not, the law would have no need for the distinction between the strict compliance required in tax-refund cases and the substantial compliance permitted in cases involving other issues, such as government proprietary activity.[17]

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[17] Appellant alleges the City waived any claim that this case is not governed by Section 910. (Opening Brief at 11, fn. 10.) The question however is not whether the City's local ordinance or Section 910 governs but whether claiming requirements must be strictly construed. Instead, as

In the context of a tax refund claim, strict compliance with Section 910 requires that the name and post office address of each claimant appear on the face of the claim. Otherwise, subdivision (a) would read "The name and post office address of the claimant, **or the person acting on his or her behalf** ... ." That it does not demonstrates that strict compliance cannot be achieved without providing individual information for each member of a purported class. Appellant does not, and cannot, allege that the administrative claim he presented to the City included any information regarding other members of the purported class, and the record demonstrates that it did not. (CT 42-45.) This cannot possibly be considered strict compliance.

In sum, Section 910 does not expressly authorize class claims – and instead requires individualized information – and the inferences relaxed standards of *City of San Jose* do not apply to tax refund cases.

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the Court of Appeal explained, the viability of the class claim here "depends on whether the claimant is required to comply strictly with the requirements of the statute or whether the claimant can merely substantially comply. If strict compliance is required, the claimant cannot pursue a class claim. On the other hand, if the claimant's substantial compliance can satisfy the statute, he or she can pursue such a claim." *Opinion*, 174 Cal.App.4th at 378. The result is the same under the City's local ordinances – Los Angeles Municipal Code ("LAMC") §§ 21.1.12 and 21.07 – which do not expressly permit or even discuss class claims and require the claimant's individual information. (*See* Exhibit G and H, Request for Judicial Notice.) Appellant cannot satisfy the claims requirements of the LAMC under a strict compliance standard any more than he can satisfy the requirements of Section 910.

B. Neither Article XIII, Section 32 Nor *Woosley* Excepts Claims Under Section 910 From The Requirement Of Express Legislative Authorization for Tax Refund Claims And Strict Compliance With Statutory Refund Procedures

Appellant contends that, through Government Code Sections 910.6 and 910.8, the "Legislature expressly provided that a substantial compliance standard applies to tax refund claims presented pursuant to Section 910." (Opening Brief at 16.) Again, Appellant's argument fails for several reasons.

First, Sections 910.8 and 910.6 cannot trump the Constitutional requirements of Section 32. The Legislature can provide a lesser claiming requirement, but cannot replace the rule of *Woosley* and Section 32 that courts strictly construe the claiming requirements the Legislature does provide nor its rule that tax remedies be expressly authorized by the Legislature. Given that Section 910 does not expressly authorize class claims, it goes against logic that Section 910.8, a provision of the same statutory scheme that does not expressly provide for tax refund claims, could relieve Appellant from strict compliance required under *Woosley* and Section 32.

Second, the Legislature's provisions as to the remedy for a partially compliant claim do not change what constitutes full or strict compliance with Section 910. Section 910.8 simply provides the remedy for a partially defective claim brought under the Government Claims Act; that Section does not change or purport to change what constitutes strict compliance with Section 910. Appellant's observation that the failure to strictly

comply with the claims procedures of the Government Claims Act is sometimes excused in non-tax cases does not alter what constitutes strict compliance in tax cases where such compliance is required by our Constitution. If anything, the fact that strict compliance with the procedures of the Government Claims Act is sometimes excused merely highlights the fact that strict compliance requires something more than the usual level of effort.

Thus, while some claims filed under the Government Claims Act are not subject to strict compliance, under Section 32 and *Woosely,* tax claims are. If the Legislature wishes to authorize class claims for tax refunds, it can do so expressly, but it may not delegate to the courts to find such authority by implication. Requiring individual information for a claimant under Section 910, but limiting the remedy where all of the requested information is not provided, is not at all the same as express authorization to file a class claim for a tax refund. The class action remedy is expensive, inefficient and potentially devastating. It is powerful tool designed to serve the public interest. Its introduction in the law of local government finance is a weighty decision that Section 32 dictates be made by the Legislature, which can balance the benefit of enhanced enforcement of limits on tax laws and the harms of disrupting government finance and imposing a costly remedy that can only be funded by the taxpayers who are allegedly to benefit. Under Section 32, it is not for the judicial branch to make that decision.

There simply is no express authorization of class claims to be found in Section 910.

III. CONCLUSION

Appellant's purported class claim for a tax refund was without legislative authorization, and the decision of the Court of Appeal to affirm the trial court's determination that this litigation cannot proceed as a class action was therefore correct. Moreover, both lower court decisions here are fully consistent with this Court's precedent, the provisions of Article XIII, Section 32 of our Constitution, fundamental public policy and the best interests of the taxpayers of this state. Further, the Court of Appeal's decision restores uniformity among the courts of appeal. It should therefore be affirmed in its entirety.

DATED: December 23, 2009

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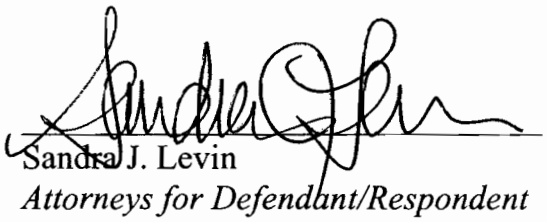

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CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 8.204(c)(1)

Pursuant to California Rules of Court 8.204(c)(1), the foregoing *Answer Brief On The Merits* contains 11,032 (including footnotes, but excluding the tables and this Certificate.) In preparing this certificate, I relied on the word count generated by Microsoft Word 2007.

DATED: December 23, 2009

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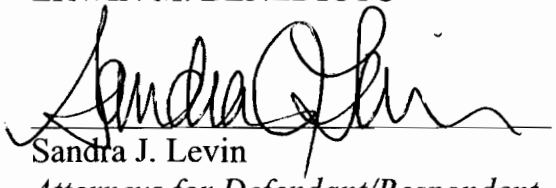

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DECLARATION OF SERVICE

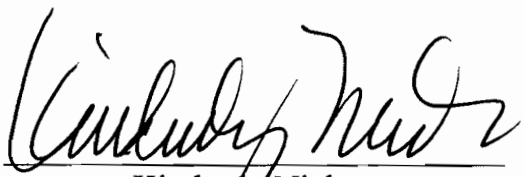
I, Kimberly Nielsen, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a part to or interested in the within action; that declarant's business address is 300 South Grand Ave, 27th Floor, Los Angeles, CA 90071.

2. That on December 23, 2009, declarant served the **ANSWER BRIEF ON THE MERITS** via U.S. Mail in a sealed envelope with postage thereon fully paid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 23rd day of December, 2009, at Los Angeles, California.



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Estuardo Ardon v. City of Los Angeles, et al.
Supreme Court Case No. S174507

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